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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 11.

GEORGE W. McCANDLESS, as Receiver of Duquesne Gas Corporation,

Petitioner,

—against—

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION and CHAUCER CORPORATION,

Respondents.

PETITION FOR REHEARING ON BEHALF OF MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION AND CHAUCER CORPORATION, DEFENDANTS BELOW.

LOUIS B. EPPSTEIN,
Counsel for Respondents.

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Respondents.

Petition for Rehearing on Behalf of Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants Below.

To the Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named defendants, Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, present this, their petition for a rehearing of the above-entitled cause.

I.

JURISDICTION.

The petition for certiorari in this cause was filed on March 28, 1934, and certiorari was granted on

April 30, 1934. This Court rendered its decision on November 5, 1934, reversing the judgment of the United States Circuit Court of Appeals for the Second Circuit and remanding the cause to it for the determination of the questions relating to the liability of the defendants.

This petition is filed within less than twenty-five days thereafter, under Rule 33 of the General Rules of the United States Supreme Court.

II.

Reasons for Petition for Rehearing.

THE RESPONDENTS CONTEND THAT THE QUESTION HERE INVOLVED IS:

> NOT WHETHER COMPLAINANT SIMPLY LACKED CAPACITY TO SUE; BUT WHETHER COMPLAINANT HAVING NO TITLE TO ASSETS WITHIN THE SOUTHERN DISTRICT OF NEW YORK WAS WHOLLY WITHOUT A CAUSE OF ACTION IN THIS CASE.

1. Complainant's petition for a writ of certiorari filed in this Court contains the statement that (p. 3):

> "Upon the appeal the defendants Maxime H. Furlaud and Kingston Corporation raised for the first time the question of complainant's title to sue"

and set out the action of the Court thereon.

2. Notwithstanding this statement in the petition, the order of this Court granting the writ of certiorari limited it:

> "to the questions pertaining to the validity of the appointment of the petitioner as ancillary

receiver, and his right as such to maintain this suit" (R. 74).

3. Upon the assumption that no other question would be considered by this Court the respondents limited the record and their briefs to these questions.

Respondents believe that they have demonstrated in their briefs that the order purporting to appoint complainant ancillary receiver of the Duquesne Gas Corporation (R. 50-52) was an absolute nullity, that the United States District Court for the Southern District of New York had no jurisdiction to make such order, and that by reason of this order no additional right, power or authority was conferred upon complainant.

4. This Court in its opinion did not discuss the issues provided for in its order, but instead based its decision solely upon the question of whether defendants in the lower court had properly raised the question of complainant's lack of capacity to sue.

5. The respondents contend not only that that issue was properly raised by the defendants in their answer in accordance with Equity Rule 30 as interpreted by this Court in *Grant* v. *Leach & Co.,* 280 U. S. 351, and in accordance with the decision of this Court in *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73, affirming 246 Fed. 753, but that that was not the real issue involved. The actual issue in this case is whether the complainant, personally or in any capacity, had any title to or interest in the cause of action asserted against these defendants.

6. Nowhere in the opinion of this Court is any consideration given to the question urged by respond-

ents under the limited order granting the writ. The proposition for which respondents contend is:

> THAT THE UNCONTRADICTED TESTIMONY IN THIS CASE AND THE ADMISSIONS OF COUNSEL IN THE LOWER COURT, IN THE CIRCUIT COURT OF APPEALS AND IN THIS COURT, DEMONSTRATED THE FACT THAT COMPLAINANT IN THIS CASE HAD NO TITLE TO ASSETS IN THE SOUTHERN DISTRICT OF NEW YORK, AND, THEREFORE HAD NO CAUSE OF ACTION AGAINST DEFENDANTS.

Whether or not complainant had capacity to sue, if he were wholly without title to or interest in the cause of action asserted by him, the decision of the United States Circuit Court of Appeals should be affirmed.

7. Had respondents been advised that the question passed upon by this Court was to be considered, they would have prepared an entirely different brief and argument.

They would have insisted that the transcript of record in this Court include all of the testimony offered at the trial concerning the order made in the United States District Court for the Southern District of New York purporting to appoint complainant ancillary receiver, the action of the trial court in requiring the introduction of the entire file relating to that appointment as the best evidence and the motion to dismiss upon all the evidence made at the end of the trial by the respondents.

It is true that this Court, at page 4 of its opinion, footnote 3, refers to a part of this record, but considers it only in connection with its inquiry concerning the defendants' supposed contention that complainant merely lacked capacity to sue.

However, what we contend is that this testimony affirmatively established the fact that this complainant never acquired any title to the asserted cause of action. In other words, we might even concede that if this complainant had right, title or interest in this cause of action, either by reason of his original appointment or by the purported order of the United States District Court for the Southern District of New York, his mere lack of capacity to sue may not have been so urged in the lower court as to justify its consideration for the first time upon appeal. But we insist that if he had no title to the cause of action, if he had no right of action against the defendants, as is apparent in this case, that fact could be shown at any time. As stated in the case of *Sterrett* v. *Second Nat. Bank,* 246 Fed. 753, at page 758:

> "It follows that in the present state of the record the defendant is entitled to a dismissal of the suit, notwithstanding its apparent failure to call to the attention of the court below the proposition on which our decision is based; for, if plaintiff had no title and no right of action in the court below, that court was without power to render decree in his favor. * * * A defense that plaintiff had no title to the asserted right of action is always open."

8. The Court seems to attach some importance to the fact that respondents' counsel in the Circuit Court of Appeals urged that Court to pass upon the liability of the defendants to account even after the Court had indicated that it intended to reverse the decree of the District Court upon the grounds stated in its opinion.

This Court obviously was under the impression that counsel for the respondents intended to waive all other questions.

In fact, in the Circuit Court of Appeals, counsel in his brief raised four questions, the third of which was directed to the particular question here considered.

In the course of counsel's argument, he stated to the Circuit Court of Appeals that he did not waive any of the questions raised by him in his brief, and desired to be understood as insisting upon all of them but that he expected to confine his oral argument to one point; but he asked the Court to read and consider his brief on all of the other questions involved, and he received the express assurance from the Court that it would so do.

He did confine his argument to questions involving the merits until the Court asked him what his views were upon the question of complainant's title, to which his opponent had devoted almost his entire argument. Counsel for respondents then discussed that question at some length.

Filed herewith is a copy of the brief of respondents in the Circuit Court of Appeals for the Second Circuit, from Point III of which it will appear that respondents did not waive or intend to waive this question. He then felt and now feels that an ancillary receiver might at some time hereafter be legally appointed and the entire matter re-litigated and therefore urged that the Court should also pass upon the liability of the defendants to account, and finally dispose of the case.

Argument.

Respondents respectfully contend that the actual question here involved is, not whether a plaintiff having title to the subject matter of a suit and a cause of action either in his own right or in some repre-

sentative capacity was merely disabled to sue for want of capacity but, whether this plaintiff had any right, title or interest of any character in the subject matter of this suit.

There is no conflict between counsel as to what occurred in the United States District Court for the Southern District of New York, in the proceedings resulting in the order purporting to appoint an ancillary receiver. The record in and the order of that Court, purporting to appoint complainant ancillary receiver, disclose upon their face that the Court was without jurisdiction to make such order.

The plaintiffs in *Booth* v. *Clark,* 17 How. 322; *Sterrett* v. *Second Nat. Bank,* 248 U. S. 73; *Hale* v. *Allinson,* 188 U. S. 56, and *Great Western Min. & Mfg. Co.* v. *Harris,* 198 U. S. 561, were all without capacity to sue, so that if that had been the only question involved in those cases the decisions could not have been sustained. This was particularly true in the case of *Sterrett* v. *Second Nat. Bank, supra.* The Transcript of Record filed in this court in that case, at page 236, discloses the fact that the question was not raised by pleading, argument or otherwise from the time the suit was instituted on May 11, 1912 until October 8, 1917, when as counsel for appellant arose in the Circuit Court of Appeals to argue the appeal, adversary counsel verbally gave notice that he would rely in his argument on the case of *Great Western Min. & Mfg. Co.* v. *Harris, supra.*

In its opinion in this case, this Court points out the fact that the want of title in those cases was disclosed on the face of the complaint and that the complaints would have been bad on demurrer.

We respectfully insist that the defect as to title in this case also appears on the face of the complaint

and that the complaint in this case would have been bad on demurrer. In Paragraph Fourth of the amended bill of complaint (R. 3-4) it is expressly alleged "that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said complainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit * * *".

If as this Court has so often held, a mere equity receiver cannot sue in a foreign court and if as this Court has so often held, the judicial power of a district court can be exercised only in a pending suit, it must follow that the order so alleged to have been made, was absolutely void.

However, in this case the lack of title of complainant to the cause of action sued on was affirmatively shown by the proof of the complainant introduced in the lower court.

The file of the proceedings had in the United States District Court for the Southern District of New York was offered and received in evidence. (Transcript of Record, United States Circuit Court of Appeals, Second Circuit, fol. 223, p. 75.)

Respondents' motion to dismiss was in effect a demurrer to the evidence and by it the Trial Court was called upon to pass on the issues of law established by the evidence.

Suydam v. *Williamson,* 20 How. 427, 436;
Van Stone v. *Stillwell & Bierce Manuf'g Co.,* 142 U. S. 128.

Respondents now urge that the questions here involved are the following:

> 1. Complainant by his appointment as Receiver in the Western District of Pennsylvania acquired no title to assets or causes of action of any kind in the Southern District of New York.
>
> *Booth* v. *Clark, supra;*
> *Hale* v. *Allinson, supra;*
> *Great Western Min. & Mfg. Co.* v. *Harris, supra.*
>
> 2. Since the United States District Court for the Southern District of New York was without jurisdiction to make the order purporting to appoint the complainant ancillary receiver, that order was absolutely void and conferred upon him no title to assets in the Southern District of New York. Therefore, he had no title to or interest in the cause of action in this suit.

The rule that if a court acts without authority, its judgments and orders are regarded as nullities, that they are not voidable but absolutely void, has been recognized by this Court from the earliest time.

> *Elliott* v. *Peirsol,* 1 Pet. 328;
> *Wilcox* v. *Jackson,* 13 Pet. 498;
> *Thompson* v. *Whitman,* 18 Wall. 457;
> *Old Wayne Mut. L. Asso.* v. *McDonough,* 204 U. S. 8.

In all of the cases cited by this Court holding that mere lack of capacity to sue could not for the first time be raised upon appeal, the plaintiffs had title, legal or equitable, to the cause of action involved in

the suits. The infant suing to recover for personal injuries certainly had a beneficial interest in the recovery. The married woman suing for property belonging to her certainly had a beneficial interest in the cause of action. The foreign corporation bringing suit to quiet title certainly owned the property involved in that suit. The father bringing suit for the negligent death of his minor son certainly had an interest in the cause of action; and so, through all of the cases cited, there was no question of complete lack of title, legal or equitable. The sole question was lack of capacity to sue.

In this case the question urged by us is complete lack of title of complainant in the cause of action sued upon.

In our oral argument before this Court we conceded that if the United States District Court for the Southern District of New York had jurisdiction under the facts of this case to confer any right upon the plaintiff, our position was untenable. On the other hand we contended, and now contend, that if the order was absolutely void, if it was a nullity, it was as though it had never been made and, therefore, it conferred no new or additional right, title or interest upon complainant.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit be, upon further consideration, affirmed.

Respectfully submitted,

LOUIS B. EPPSTEIN,
Counsel for Respondents.

Certificate of Counsel.

I, Louis B. Eppstein, counsel for Maxime H. Furlaud, Kingston Corporation, Byron Corporation and Chaucer Corporation, the above-named defendants, respondents herein, certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

LOUIS B. EPPSTEIN,
Counsel for Respondents.